Cosco Container Lines Co Ltd & Anor v Trengganu Forest Products Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–82 OF 2009 AND W-02–188 OF 2009
TENGKU BAHARUDIN SHAH, WAN ADNAN MUHAMAD AND AZHAR MA'AH JJCA
4 OCTOBER 2010

Civil Procedure — Res judicata — Decision, finality of earlier decision — No appeal — Issues raised in earlier proceedings — Whether matter fully adjudicated on merits

Evidence — Documentary evidence — Whether letters provided cogent evidence that respondent manipulated bill of lading — Whether correctly addressed by judge

The respondent contracted on 4 March 1994 with Hebai Metal & Minerals Import and Export Corp ('the buyer') to sell containers of plywood ('the cargo'). In accordance to the express terms of the contract of sale, the respondent contracted the appellants for carriage of the cargo. The carriage of the cargo as of the bill of lading stated, inter alia; (i) that the appellants would issue, in respect to the cargo, a shipment on board in accordance to bill of lading dated 30 April 1994; (ii) that the cargo should be transported from Port Klang direct to Xingang Port, China. The second appellant was the agent of the first appellant. The appellants jointly made representations to the respondent as to its obligations in respect to the bill of lading. Relying on the representation, the respondent had submitted that the bill of lading to a bank for due payment according to a letter of credit for the sale of the cargo. However, the buyer obtained an injunction to stop the bank from releasing funds according to the letter of credit on the ground that the bill of lading was fraudulent. It was discovered that the cargo was not shipped on board on 30 April 1994 according to the bill of lading and the cargo was in fact discharged in Hong Kong before transhipped on another vessel to Xingang Port, China. Following arbitration by China International Economic and Traded Arbitration Commission Beijing, an award was granted in favour of the buyer for loss incurred due to the infringement of the provisions of the bill of trading. The respondent paid the buyer and sought compensation from the appellants for the loss of the cargo and the sum of award paid to the buyer. The learned trial court judge stated, inter alia, that the respondent had proven beyond reasonable doubt that the appellants were liable to the respondent for the tort of deceit in making fraudulent misrepresentation in the bill of lading thus caused loss and damage to the respondent. On 28 July 1997 the respondent

filed the suit after more than one year after the goods were delivered to the buyer. The appellants argued that pursuant to article III r 6 of the Rules in the First Schedule to the Carriage of Goods by Sea Act (the Hague Rule), the respondent is estopped from instituting the suit as the limitation period of one year had set in. However, the respondent argued that the matter which was exhaustively argued before the senior assistant registrar and subsequently struck out before the judge in chambers but was reinstated on appeal to the Court of Appeal. The appellants submitted a letter ('exh P4') that affirmed the respondent was informed of the availability of a ship to transport the cargo which would arrive in Port Klang on 27 April 1994, but the respondent opted for another ship on 7 May 1994 as the respondent could not get the cargo to Port Klang by 27 April 1994. The appellants submitted another document ('exh 37'), a combined transport bill of lading that had handwritten remarks/amendments that the cargo should be shipped on board on 30 April 1994 and the port of discharge (originally stated as Hong Kong) was to be changed to Xingang Port made at the request of the respondent. The appellants argued that the learned trial judge had disregarded the contemporaneous documents tendered during the trial of the action.

Held, allowing the appeal with costs:

(1) The issue of estoppel based on limitation had been raised and argued before three forums, the senior assistant registrar, the judge in chambers and finally the Court of Appeal where the respondent's suit was to be reinstated and sent back for trial in the High Court. However, there was no appeal by the appellants. Hence, the issue of limitation had been determined in the respondent's favour and it should no longer be an issue in the present appeal as it had been fully adjudicated on the merits (see paras 7 & 9); *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 referred.

(2) It was manifest that exhs P4 and P37 formed essential link in the appellants' reasoning on the matter. The significance and prominence of the two documentary evidence which had provided cogent evidence that it was the respondent who had masterminded the manipulation of all the important document ie the bill of lading was not addressed by the learned trial court judge. The submission of the respondent that the manipulation of the bill of lading was the result of the appellants' misrepresentation, was unsupported by evidence (see paras 18–19).

[Bahasa Malaysia summary

Responden menandatangani kontrak pada 4 Mac 1994 dengan Hebai Metal & Minerals Import and Export Corp ('pembeli') untuk menjual kontena kayu ('muatan tersebut'). Berikutan terma jelas kontrak, responden menandatangani kontrak dengan perayu untuk mengangkut muatan tersebut. Pengangkutan muatan setakat yang dinyatakan di dalam bil muatan

menyatakan, antara lain: (i) bahawa perayu-perayu akan membuat, berkaitan dengan muatan tersebut, pemunggahan atas kapal menurut bil muatan bertarikh 30 April 1994; (ii) bahawa muatan tersebut sepatutnya dihantar dari Pelabuhan Klang terus ke Pelabuhan Xingang, China. Perayu kedua adalah ejen perayu pertama. Perayu-perayu bersama-sama membuat representasi mengenai kewajipannya berkaitan dengan bil muatan tersebut. Bersandar atas representasi tersebut, responden telah mengemukakan bil muatan kepada sebuah bank untuk bayaran sewajarnya menurut surat kredit untuk jualan muatan tersebut. Walau bagaimanapun, pembeli memperolehi injunksi untuk menghentikan bank tersebut daripada membayar wang menurut surat kredit tersebut atas alasan bahawa bil muatan adalah fraud. Didapati bahawa muatan tersebut tidak dipunggah atas kapal pada 30 April 1994 menurut bil muatan dan muatan tersebut sebenarnya telah dipunggah di Hong Kong sebelum dipindahkan ke atas sebuah kapal lain ke Pelabuhan Xingang, China. Berikutan timbang tara oleh China International Economic and Traded Arbitration Commission Beijing, suatu award diberikan memihak kepada pembeli untuk kerugian yang dialami disebabkan oleh pelanggaran peruntukan bil perniagaan. Responden membayar kepada pembeli dan memohon pampasan daripada perayu-perayu atas kerugian muatan dan jumlah award yang dibayar kepada pembeli. Hakim bicara yang bijaksana menyatakan, antara lain, bahawa responden telah membuktikan melampaui keraguan yang munasabah bahawa perayu-perayu bertanggungjawab kepada responden terhadap tort penipuan dalam membuat representasi salah secara fraud di dalam bil muatan dan dengan itu menyebabkan kerugian dan kerosakan kepada responden. Pada 28 Julai 1997 responden memfailkan guaman selepas lebih daripada setahun muatan dihantar kepada pembeli. Perayu-perayu menghujah bahawa berikutan perkara III k 6 Kaedah-Kaedah di dalam Jadual Pertama Akta Pengangkutan Barang Melalui Laut (Hague Rule), responden dihalang daripada memulakan guaman tersebut kerana tempoh had masa satu tahun telah bermula. Walau bagaimanapun, responden berhujah bahawa perkara tersebut telah dihujahkan secara menyeluruh di hadapan penolong kanan pendaftar ('PKP') dan kemudian dibatalkan oleh hakim dalam kamar tetapi dimasukkan semula atas rayuan ke Mahkamah Rayuan. Perayu-perayu menghujah bahawa surat ('eksh P4') yang mengesahkan responden telah diberitahu mengenai terdapatnya kapal untuk mengangkut muatan tersebut yang tiba di Pelabuhan Klang pada 27 April 1994, tetapi responden memilih kapal lain pada 7 Mei 1994 kerana responden tidak dapat menghantar muatan tersebut ke Pelabuhan Klang pada 27 April 1994. Perayu-perayu menghujah bahawa satu lagi dokumen ('eksh 37'), bil muatan penghantaran bersama yang mengandungi nota tulisan tangan/pindaan bahawa muatan tersebut sepatutnya dipunggah atas kapal pada 30 April 1994 dan pelabuhan pemunggahan (pada asalnya dinyatakan sebagai Hong Kong) ditukar kepada Pelabuhan Xingang dibuat atas permintaan responden. Perayu-perayu menghujah bahawa hakim bicara yang bijaksana tidak

menghiraukan dokumen-dokumen semasa yang dikemukakan pada perbicaraan tindakan tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Isu estopel berdasarkan had masa telah dibangkitkan dan dihujahkan di hadapan tiga forum, PKP, hakim dalam kamar dan akhir sekali Mahkamah Rayuan di mana guaman responden dimasukkan semula dan dihantar semula untuk perbicaraan di Mahkamah Tinggi. Walau bagaimanapun, tidak ada rayuan oleh perayu-perayu. Maka, isu had masa telah diputuskan berpihak kepada responden dan ia tidak perlu lagi dijadikan isu di dalam rayuan ini kerana telah diputuskan sepenuhnya atas merit (lihat perenggan 7 & 9); *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 dirujuk.

(2) Adalah jelas bahawa eksh P4 dan P37 membentuk kaitan yang penting di dalam alasan perayu-perayu dalam perkara ini. Kepentingan dan keutamaan kedua-dua keterangan dokumentar yang telah memperuntukkan keterangan yang meyakinkan bahawa responden yang mendalangi manipulasi kesemua dokumen iaitu bil muatan tidak dibincangkan oleh hakim bicara yang bijaksana. Penghujahan responden bahawa manipulasi bil muatan adalah disebabkan oleh salah representasi oleh perayu-perayu, tidak disokong oleh keterangan (lihat perenggan 17–18).]

Notes

For cases on decision, finality of earlier decision, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 6707–6726.

For cases on documentary evidence generally, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1187–1385.

Cases referred to

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57, CA (refd)

Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor [2000] 1 MLJ 479, CA (refd)

Legislation referred to

Carriage of Goods By Sea Act 1950 First Schedule

Appeal from: Suit No D-5–22–412 of 1997 (High Court, Kuala Lumpur)

Cecil Abraham (Jeremy M Joseph, Rishwant Singh and Gary E Chong with him) (Joseph & Partners) for the first appellant.

Ravin Woodhull (Mohan Das with him) (Zaid Ibrahim & Co) for the second appellant.

M Nagarajah (R Tharmy and Tanya Lopez with him) (Shook Lin & Bok) for the respondent.

Azhar Ma'ah JCA (delivering judgment of the court):

[1] This is an appeal by the defendants: (1) Cosco Container Lines Co Ltd; (2) Chung Chiao Shipping Sdn Bhd against the judgment of Kuala Lumpur High Court dated 8 January 2009 in favour of the plaintiff, Trengganu Forest Products Sdn Bhd. The factual background of the plaintiff's claim as stated in the trial judge's grounds of judgment are as follows.

(2) The plaintiff through a contract dated 4 March 1994 (No 94HBM-002) ('the contract of sale'), agreed to sell 56 containers of plywood ('the cargo') to Hebei Metal & Minerals Import and Export Corporation ('the buyer'). The express terms of the contract of sale stipulate that:

(a) the shipment of the cargo must not be later than 30 April 1994;

(b) the cargo be loaded at the Malaysian Port;

(c) the cargo be discharged at Xingang Port, China; and

(d) payment to be made by way of irrevocable letter of credit.

(3) For the purpose of the shipment of the cargo, the plaintiff agreed to enter into a contract of carriage for the cargo with the defendants. The said contract of carriage is to be evidenced by a bill of lading No PKXG-4018 on the following terms:

(a) the defendants are to issue a shipped on board of bill of lading dated 30 April 1994;

(b) the cargo should be transported from Port Kiang direct to Xingang Port, China; and

(c) the bill of lading was issued by the defendants indicating compliance with the said terms.

(4) The second defendant was at all material times the agent of the first defendant.

(5) The first defendant issued the bill of lading as 'shipped on board' on 30 April 1994 about the vessel TUO HE V.103 ('TUO HE') at Port Kiang and for discharge at Xingang Port, China, purporting to enter into the contract of carriage with the plaintiff. The defendants in the bill of lading made the following representations/statements:

(a) the cargo was shipped on board on 30 April 1994; and

(b) TUO HE's port of discharge is Xingang Port, China.

(6) Relying on the said representations, the plaintiff submitted, inter alia, the bill of lading to the negotiating bank for due payment pursuant to a letter of credit. However, the buyer obtained an injunction to stop one Bank of China, Changsha from releasing funds pursuant to the letter of credit on the ground that the bill of lading was fraudulent.

(7) It was subsequently discovered that the cargo was not 'shipped on board' on 30 April 1994 as representated by the bill of lading and the cargo was in fact discharged at Hong Kong before being transshipped on another vessel to Xingang Port, China.

(8) In the arbitration between the buyer and the plaintiff before the China International Economic and Trade Arbitration Commission, Beijing ('CIETAC') in relation to the dispute concerning the contract of sale, CIETAC granted an award dated 2 September 1996 in favour of the buyer. Pursuant to the said award, the plaintiff made payment to the buyer and incurred loss and expense totaling US$276,230.

(9) The plaintiff in this suit is seeking compensation from the defendants for the total sum of US$1,446,469.58 together with interest and costs, being the loss of the cargo (US$1,170,239.58) and the payments made in connection to the award (US$276,230) in relying on the said representations made by the defendants.

[2] At the end of the trial, the learned trial judge made his decision as follows:

Based on the above considerations, the court concludes that:

(a) The plaintiff has established beyond reasonable doubt that the defendants are liable to the plaintiff for the tort of deceit in making fraudulent misrepresentation in the bill of lading.

(b) The defendants have failed to discharge the onus of proving fraud on the part of the plaintiff in instructing the defendants to make the said representation in the bill of lading and thus the defendant's defence of exturpi causa non oritur action must fail;

(c) The plaintiff has proven beyond reasonable doubt that the defendants have caused loss and damage to the plaintiff in the sum totaling US$1,446,469.58 as a result of the fraudulent misrepresentation made by the defendants in the bill of lading.

Therefore, judgment be entered for the plaintiff against the defendants as prayed in the re-amended writ and statement of claim dated 17 May 2008 filed herein.

[3] Substantially, two issues were raised in the argument before us. Firstly, is the question as to whether the limitation period of one year (under the Carriage of Goods By Sea Act 1950, (which incorporates the Hague Rules)) apply. Secondly, is the issue whether the learned trial judge in coming to his decision 'has carefully and judicially evaluated and appreciated the facts, the evidence and the documents' before him.

[4] On the first issue our attention is drawn to article III r 6 of the Rules in the First Schedule of the COGSA (the Hague Rules) which reads as follows:

> 6 Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.
>
> The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.
>
> In any event *the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods* or the date when the goods should have been delivered. In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

[5] This action apparently was filed in the High Court on 28 July 1997, more than one year after the goods were delivered to the consignee. On this premise it is submitted for the appellants that the respondent is estopped from instituting this action against the appellants as limitation had already set in.

[6] In reply to the above, counsel for the respondent argued that the matter has been exhaustively canvassed and argued before the senior assistant registrar, on appeal before the judge in chambers and finally before the Court of Appeal. What transpired in the court below was that the issue of limitation was ventilated before the senior assistant registrar in the appellants' application to strike out the respondent's claim. It was dismissed. The decision was taken on appeal before the judge in chambers and was allowed and the respondent's suit was struck out. The respondent appealed to the Court of Appeal and it was ordered that the respondent's suit be reinstated and the matter be sent back for trial in the High Court. There was no appeal against this order at the Court of Appeal.

[7] Based on the above scenario it is submitted for the respondent that the issue of limitation should no longer be an issue in the present appeal as it has been fully adjudicated on the merits. In support of this contention our attention is drawn to a number of authorities. In *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57, the Court of Appeal had these to say:

> Once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened. Although the first decision was made on an interlocutory matter which was purely procedural in nature, it was nevertheless binding on the court and on all parties to the *lis* until its reversal on appeal.

[8] On the same subject matter the decision in *Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor* [2000] 1 MLJ 479 was also referred to for our perusal. The Court of Appeal in that case decided that:

> A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit. Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication.

[9] On the facts of the case which is now on appeal before us, we have come to an inescapable conclusion that the issue of estoppel based on limitation has been raised and argued before three forums, ie the senior assistant registrar, the judge in chambers and finally the Court of Appeal. The finality is that, since there was no further appeal the issue of limitation had been determined in the respondent's favour. On that basis, the appellants fail on the first ground.

[10] Having arrived at the above conclusion there remains for consideration the second issue. It is the threshold of the appellants' defence to the respondent's claim that the appellants, at all times, made known to the respondent that the vessel MV Tuo He was estimated to arrive in Port Klang on 7 May 1994. There was no motive, necessity or occasion for the appellants to misrepresent this fact to the respondent to induce the respondent to enter into the contract of carriage with the appellants. It is submitted that the learned trial judge in coming to his decision had failed to appreciate the chronology of events and the documents underlying the respondent's cause of action against the appellants. It is further added that the trial judge had completely disregarded the contemporaneous documents that were tendered before the court during the trial of this action.

[11] In fortification of the above submission the following evidence was ventilated before us, ie:

> The very first letter written by the 1st appellant dated 14.4.1994 stated clearly and unequivocally that the MV Tuo He was estimated to arrive in Port Klang on 7.5.1994. At the same time the respondent was also informed by the 2nd appellant that there was another vessel that was due to arrive in Port Klang on 27.4.1994. The respondent, however, chose the vessel arriving on 7.5.1994 because it could not get the goods to Port Klang on time to ship them on MV Wei He (which was estimated to arrive on 27.4.1994).

[12] With regard to the above contention we had the opportunity of perusing the relevant documents in particular exhibits marked as P4.

[13] For ease of reference we reproduce P4 which reads as follows:

" CHUNG CHIAO SHIPPING SDN. BHD.
LOT 3.35, 3RD FLOOR, WISMA STEPHENS, JALAN RAJA CHULAN, 50200 KUALA LUMPUR FACSIMILE TELEGRAPH
TEL; 03-2414616 (3 LINES) CABLE: CHUNGSHIP TELEX: MA 30770 CCSX

SENDER FAX NO: (603) 2416727	REF NO: 1524/TN	DATE: 14.4.94
RECIVER FAX NO: 05-571298	TOTAL PAGES: 1 (INCLUDING THIS COVER SHEET)	

TO TERENGGANU FOREST PRODUCTS
FM CHUNG CHIAO SHIPPING KL/TONY NG
REF 1524/TN 14/4/94
ATTEN: MRS YIP

RE: 56X40' STC PLYWOOD
FM PORT KLANG TO XINGANG

FURTHER TO OUR TELECONVERSATION WE HEREBY CONFIRM YOUR BOOKING AS FOLLOWS:

VESSEL	:	MV WEI HE V.143 ETA PKL 27/4 OR MV TUO HE V.139 ETA PKL 07/5
COMMODITY	:	PLYWOOD
VOLUME	:	56X40' DV
POL/POD	:	PORT KLANG / XINGANG VIA HKG
RATE	:	USD1350/40' CY/CY
TERM	:	FRT PREPAID AT PORT KLANG

NOTE: WE AGREED TO ISSUE 30/4/94 B/L IF SHIPMENT LOADED ON MV TUO HE V.139 ETA PKL 7/5.

PLS CFM ABV ALL IN ORDER.

BEST REGARDS "

[14] It is noted that the contents of this letter affirmed the contention of the appellants that the respondent was informed of the availability of a ship MV Wei He to transport the commodity in question, that was expected to arrive in Port Klang on 27 April 1994.

[15] We had also perused the other relevant document ie exh P37, a combined transport bill of lading. This document was in draft that was sent to the respondent by the second appellant with certain amendments to be made. We note that this document in question in its original form contained the true and actual details and particulars pertaining to the shipment and the consignment. Apparently the document which was received by the respondent on 7 May 1994 was faxed back to the second appellant by the respondent on the same day with a request that certain amendments were to be made. The detail of the amendments were handwritten, admittedly by the staff of the respondent. Au Yong Mee Yen (PW3). This witness in her evidence before the trial judge in no uncertain terms informed the court that she had handwritten the remarks/amendments that were to be made in the draft combined transport bill of lading in the following manner:

(i) ON BOARD DATE MUST BE 940430 also

(ii) Port of Discharge (originally stated as Hong Kong) was to be changed to 'XINGANG PORT'.

[16] On the basis of the above scenario and events it is submitted before us that the amendments to certain true and original particulars found in the exh P37 were made at the request and at the behest of the respondent. In the circumstances, it is submitted further that the learned trial judge in coming to his conclusion has failed to appreciate the importance and significance of the contemporaneous documents such as exhs P4 and P37.

OUR FINDINGS

[17] In the face of the above mentioned issue and contention of the appellants, we had perused the response and answers put to the fore by the respondent in resisting the appellants' grounds of appeal. Unfortunately, we don't seem to be able to find much substance in the respondent's replies. We note that what were submitted by the respondent were unsupportable by substantive evidence.

[18] In our judgment it is manifest that exhs P4 and P37 formed an essential link in the appellants' reasoning on the issue. From our observation it is apparent that the learned trial judge did not address his mind to the significance and prominence of the two documentary evidence which in our view had provided cogent evidence that it was the respondent who had masterminded the manipulation of the all important document ie the bill of lading P37.

[19] It is also our view that the submission of the respondent that the manipulation of the bill of lading was the result of the appellants' misrepresentation, is unsupported by evidence.

[20] For all these reasons we are satisfied and we hold that the learned trial judge in deciding as he did has fallen into error and we therefore, allow the appellants' appeal with costs and set aside the High Court's order.

Appeal allowed with costs.

Reported by Mashrifah Ravendran